REDACTED -- For Public Inspection

August 1, 2005

Marlene H. Dortch
Secretary, Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: WC Docket No. 05-65

Dear Ms. Dortch:

AT&T and SBC ("Applicants") respectfully submit this response to the July 14, 2005 *ex parte* letter filed by Cbeyond Communications, Conversent Communications, TDS Metrocom, and XO Communications ("the Joint CLECs"). In this 23-page letter, the Joint CLECs have intensified their rhetoric and made a series of further attempts to support their claims that the proposed merger will substantially reduce competition in the provision of wholesale special access services to CLECs. However, as explained in detail below, the Joint CLECs' latest efforts possess no more substance than did their previous discredited claims, and the Commission can now put the special access issue in this merger proceeding to rest, once and for all.

Applicants previously refuted the Joint CLECs' claims with documented *facts*. We demonstrated, with facts, not hypotheses, that AT&T provides only relatively trivial amounts of wholesale access alternatives by providing data on AT&T's actual wholesale sales of dedicated local services. We further demonstrated, with facts, that other CLECs could readily replace AT&T's wholesale services by presenting detailed evidence of where AT&T and other CLECs actually have local facilities. Specifically, we demonstrated, again with facts, that AT&T has local facilities in 19 dense commercial areas in SBC's region, that each of these areas is also served by other CLECs, that other individual CLECs have more on-net buildings and more deployed fiber than does AT&T, and that other CLECs collectively serve many times more buildings and have deployed much more local fiber than AT&T.[1] We also demonstrated, again with facts based on the Commission's prior findings, that CLECs can provide direct connections to virtually all of AT&T's on-net buildings (and, in many cases, already do so), and that the CLECs have the same (or greater) ability as AT&T economically to serve any remaining buildings (including any building that AT&T serves using leased facilities) by connecting special access circuits (or UNEs) to their metropolitan fiber and providing so-called "partial Type II" service.[2]

Although the Joint CLECs make a number of efforts to impeach these hard facts, they offer no facts of their own. Instead, they offer speculation and misrepresentations and contend

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[1] 6/24/05 SBC-AT&T Ex Parte at 2; SBC-AT&T Joint Opposition, Carlton-Sider Reply Dec. ¶¶ 31-51, App. 1 & Fea *et al.* Dec. ¶¶ 7-14; AT&T Response to FCC Information Request Nos. 6(a) & 6(d).

[2] 6/24/05 SBC-AT&T Ex Parte at 2-7; SBC-AT&T Joint Opposition, Carlton-Sider Reply Dec. ¶¶ 31-51.

that the actual data provided by Applicants is inconsistent with earlier *estimates* that had been made by analysts or ILECs who did not then have the relevant facts now in the Commission's possession. But it is elementary that the Commission's determinations must be based on actual facts and data when they are available and that hard facts and data cannot be impeached by prior uninformed estimates or surmise (even if those prior estimates were then the best available substitute for the actual facts). Because the Joint CLECs have once again confirmed that is all they can offer, their claims can and should now be summarily dismissed.

As a threshold matter, all the Joint CLECs' claims rest on an analysis performed by Dr. Simon Wilkie, who, in their words, reached his conclusions by "min[ing]" various data sources.[3] But most of these data "sources" are not public, and the Joint CLECs rejected our request that the underlying "data" be placed in the record (subject to protective orders).[4] In addition to demonstrating that the joint CLECs have no confidence in the data or in Dr. Wilkie's analysis of them, their refusal to place the data in the record itself precludes the Commission from placing any reliance on the Joint CLECs' claims.

In any event, the Joint CLECs' unsupported claims have been thoroughly refuted by the extensive factual record the Commission has compiled. While the Joint CLECs have attempted to question these facts in their letter, each of their claims fails by its terms.

First, contrary to the Joint CLECs' unsupported assertions, AT&T is simply not a significant provider of wholesale special access services to CLECs, and the proposed merger therefore could not have a material impact on the prices CLECs pay for wholesale special access services. Unlike many other CLECs, AT&T's focus is on serving its retail commercial customers through equipment deployed in the customer's premises that cannot be used to serve other tenants in the same building. AT&T currently provides about **[BEGIN CONFIDENTIAL] [END CONFIDENTIAL]** annually of wholesale special access services in the entire SBC region, only a small fraction of which is derived from sales to CLECs. This is an insignificant fraction of the billions of dollars in total annual sales and, indeed, even of the total CLEC subset of those sales.[5] And although the Joint CLECs now contend that it is the "Type II" services of AT&T that are most significant, AT&T's annual wholesale revenues in the SBC region include less than **[BEGIN CONFIDENTIAL] [END CONFIDENTIAL]** of these services[6] – with less than a third of these sales to CLECs.

Because these facts are fatal to the claims of the Joint CLECs, their letter goes to great lengths to try to impeach them. They contend that AT&T has "omit[ted]" revenues from certain wholesale services and that AT&T's sworn testimony is "grossly inconsistent with AT&T's representations to the SEC," with a "Yankee Group study," and with allegations that SBC made

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[3] 7/14/05 Joint CLECs Ex Parte at 2.

[4] *See* 06/22/05 Letter from Michael Hunseder to Brad Mutschelknaus; 06/29/05 Letter from Brad Mutschelknaus to Michael Hunseder.

[5] 7/15/05 Joint CLECs Ex Parte at 2; *see also* Appendix A *infra*.

[6] SBC-AT&T Joint Opposition, Fea *et al.* Dec. ¶ 43.

in a filing last October.[7] As more fully explained in Appendix A to this letter, none of these claims has any substance. The AT&T wholesale revenue figures that we have submitted through sworn testimony include *all* of AT&T's revenues from the provision of all of its wholesale dedicated local access services, be they loops, interoffice transport without loops, entrance facilities, or combinations of such facilities. Similarly, the alleged inconsistent statement from an AT&T SEC 10-K report was, in fact, a disclosure of AT&T's overall revenues from *local voice* services, including switched voice and UNE-based services. By contrast, dedicated service revenues were reported in a separate category and included the exact same wholesale local dedicated service revenues reported in AT&T's sworn testimony in this proceeding. The earlier Yankee Group "study" reflected mere estimates made by an analyst who did not have access to the actual facts, and as Applicants have previously demonstrated, that analyst overstated AT&T's revenues by more than six fold.[8] And the assertions in SBC's earlier filings were not based on actual facts and made no claims about the magnitude of AT&T's wholesale dedicated local access revenues. Actual facts obviously cannot be impeached by mere estimates, and where the actual facts are known, the Commission must make its determinations based on those facts and not on surmise of an analyst or other party that had no access to the underlying data. This is particularly true where, as is the case here, there are facts known to the Commission that directly and completely refute the erroneous assumptions and estimates.

The Joint CLECs also contend that even though AT&T has trivial volumes of wholesale special access sales, its mere existence has caused other unaffiliated CLECs to offer substantially lower prices than they otherwise would have.[9] However, AT&T's wholesale local private line sales are small and declining, and there is no possible basis to conclude that such a trivial and declining player could have a substantial constraining effect on price. Indeed, AT&T's dedicated wholesale local access prices are, in fact, higher than the prices of other CLECs that focus on wholesale sales.[10] In any event, the contrary claims of the Joint CLECs rest entirely on purported "bid data" that the Joint CLECs alone possess and that they have refused to place on the record. Their claims are entitled to no weight for that reason alone.

Second, AT&T's local network facilities are nowhere near as extensive or significant as the Joint CLECs maintain. Applicants have submitted into the record in this proceeding literally thousands of pages of actual facts about the local network facilities of AT&T and other CLECs that demonstrate this to be the case. It is quite irrelevant that analysts (and SBC and other ILECs) that had no access to these data previously estimated, based on the limited information available to them, that AT&T had a greater presence than it actually does. It is the actual facts that matter, and, as explained in more detail in Appendix B to this letter, to the extent the Joint CLECs' assertions on this issue are relevant, they all rest on arguments that are factually incorrect.

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[7] 7/14/05 Joint CLEC Ex Parte at 17-20; *see id.* at 15.

[8] 7/15/05 AT&T-SBC Ex Parte at 5

[9] *Id.* at 15-16 & 19-20.

[10] *See* 6/24/05 SBC-AT&T Ex Parte at 7 n.25; App. A *infra.*

Preliminarily, contrary to the Joint CLECs' assertion, AT&T is not "by far" the CLEC that has been "most successful in deploying fiber."[11] There are several other CLECs that have deployed comparable miles of local fiber nationally. There are individual CLECs who have on-net connections to more buildings than AT&T (both nationally and in individual cities). And other CLECs collectively serve many times more buildings and have deployed much more local fiber than AT&T.[12] Further, whereas other CLECs in the SBC region have targeted wholesale sales, more than three quarters of AT&T's on-net buildings are fiber-to-the-floor configurations that cannot economically be used to provide DS1 level services to reach other tenants in a building. Most pertinently, Applicants have demonstrated that there are scores of other active fiber-based CLECs in the SBC region and that because "good fishermen fish where the fish are,"[13] other CLECs have deployed backbone fiber in the same dense commercial areas, along the same streets, and often in the very same high demand buildings that AT&T serves.[14]

The Joint CLECs now seek to minimize the significance of these facts by asserting that AT&T (and MCI) have direct connections to buildings with more "bandwidth" than do other CLECs, and that SBC's acquisition of AT&T's purportedly high "share" of "bandwidth" would result in a significant bandwidth HHI concentration increase.[15] But for reasons that are explained in more detail in Appendix B, these claims are fundamentally wrong as a matter of fact and irrelevant as a matter of law.

Foremost, the "bandwidth" analysis of the Joint CLECs is fatally flawed. First, it is now clear that the Joint CLECs' analysis was based on the purported AT&T "Lit Building List" recently identified by Global Crossing.[16] But this list is wrong and overstates the number of buildings to which AT&T has direct connections by almost three times. Further, the analysis depends on a purported data source for "bandwidth" (GeoResults' National Telecommunications Data ("NTD")) that simply cannot be used to make calculations of "market shares" of bandwidth in any area. The NTD database does not contain the bandwidth that is actually used by the tenants in any individual building. Rather, it contains estimates of total demand at buildings based on a simple regression study of a sample of buildings. The results of this regression are used to *project* bandwidth demand and telecommunications spending for millions of buildings outside of the regression sample. But such an approach cannot possibly identify for the millions of buildings outside of the regression sample the individual offices or firms that have above-average or unique bandwidth needs, such as data or call centers. For these and other reasons, the NTD data base radically understates the number of buildings with OCn level demand and the estimates for individual buildings are pervasively unreliable.

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[11] *Id.*

[12] *See* App. B *infra*.

[13] 7/14/05 Joint CLEC Ex Parte at 4.

[14] *See* 7/18/05 SBC-AT&T Ex Parte (attaching maps); 6/24/05 SBC-AT&T Ex Parte (attaching maps).

[15] 7/14/05 Joint CLEC Ex Parte at 9-12.

[16] *Compare id.* at 9.

In this regard, contrary to the Joint CLECs' assertions,[17] SBC did not "use[ ] the same data for the same purposes" in the earlier Triennial Review proceedings. SBC has never made any use of the GeoResults NTD database for any purpose in any prior Commission proceedings. Rather, SBC used a different GeoResults data base (GeoLit) for the different purpose of identifying on-net buildings served by CLECs – while stating that it was doing so only because it did not then have the information about AT&T's actual network and about the on-net buildings of other CLECs that has been placed in the record here.

But even if there were a showing of a significant HHI increase in MSA-wide shares, the Joint CLECs are simply wrong in asserting that it follows that the merger would harm competition. As Applicants previously demonstrated, statistics about concentration in an MSA-wide "market" themselves have no significance here, regardless of whether shares are calculated based on bandwidth, buildings served, or some other measure.[18] AT&T (and other CLECs) generally offer service only in the high density portions of large cities, and the merger has no effect on competition in those lower-density areas of MSAs that are served only by SBC.

Most fundamentally, regardless of how geographic markets are defined, a showing of an HHI increase is at most the first step in a competitive analysis. The ultimate question is whether other CLECs could respond to a hypothetical price increase by providing alternative connections to the buildings served by AT&T. As we have demonstrated in detail, CLECs plainly could and would do exactly that. A substantial percentage of the AT&T on-net buildings are already served by other CLECs, and, as we have also shown, the Commission's prior findings establish that CLECs could respond to any hypothetical price increase by establishing their own direct on-net connections in the majority of the remaining buildings. That is particularly so because these are buildings where AT&T's very presence proves that there are no right-of-way or building access problems. Finally, to the extent that there are a handful of scattered buildings where CLECs would be impaired in establishing alternative facilities, they can use UNEs or special access to establish partial Type II arrangements, and any such buildings are, in any event, far too few and too scattered to have any competitive significance.

Third, the Joint CLECs again wrongly claim that the Commission's impairment findings have no relevance to a merger analysis. Indeed, the Joint CLECs merely repeat verbatim (and indeed quote) the arguments that were made in their earlier letter of June 6, 2006, while ignoring our subsequent refutation of these very arguments.[19] As we explained before and as we explain again in detail in Appendix B, a determination of non-impairment establishes that an efficient CLEC can currently provide competing services at today's prices by using its own facilities and

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[17] *Id.* at 5.

[18] 7/15/05 AT&T-SBC Ex Parte at 7.

[19] *Compare* 7/14/05 Joint CLEC Ex Parte at 13 (providing block quote of 6/6/05 Responding CLEC Ex Parte Letter at 8) *with* 6/24/05 SBC-AT&T Joint Ex Parte at 9 (refuting this argument).

without making any use of ILEC facilities.[20] It is a determination that there are now no operational or economic barriers to the deployment of alternative facilities and use of them to offer competitive services.[21] In short, contrary to the Joint CLECs' assertion, the Commission's findings establish that actual or potential entry will prevent the merger from resulting in any sustainable price increases. Given that the Commission has found that entry is economic at *prevailing* prices, entry would certainly be economic should SBC-AT&T try to *raise* prices. In any event, the Joint CLECs ignore that the vast majority of the AT&T on-net buildings as to which we have applied the Commission's impairment analysis are buildings with OCn-level demand that the Joint CLECs have agreed can be competitively supplied.

Finally, the Joint CLECs' assertion that the merger would harm competition by eliminating AT&T's Type II services is, as explained in more detail in Appendix C, without any substance. Preliminarily, contrary to the Joint CLECs' assertion,[22] Applicants are not contending that partial Type II services of CLECs provides no benefits to customers. However, as noted, AT&T annually provides only **[BEGIN CONFIDENTIAL] [END CONFIDENTIAL]** of partial Type II services in SBC's region[23] – with a less than a third coming from services to CLECs – and AT&T prices these wholesale circuits at significantly higher levels than Type I services. It is fanciful to suggest that these partial Type II services could have a substantial effect on prices offered by other CLECs.

In any event, AT&T's partial Type II services can be replaced by any CLEC with backbone fiber in the area, for other CLECs can obtain special access links from the ILEC at the same rate (or a more favorable rate) than AT&T pays. Again, the only way that the Joint CLECs can contend otherwise is by attempting to impeach the documented facts with surmise, speculation, or outright misstatements. Foremost, contrary to the Joint CLECs' statement, it is simply not the case that AT&T receives higher discounts because "no other CLEC possesses the traffic volumes required to qualify for the maximum discounts."[24] As we have repeatedly documented through sworn testimony and other evidence that the Joint CLECs refuse to acknowledge, AT&T's higher volumes do *not* allow it to receive greater discounts and lower rates. The Joint CLECs also try another tack. They suggest that AT&T obtains high capacity channel terminations to serve one retail customer and then resells "spare" circuits on the channel to wholesale customers.[25] But as explained in Appendix C, AT&T could not and does not do any such thing. The simple reality is that because CLECs have backbone fiber in the same areas served by AT&T, they have the same ability economically to offer Partial Type II service by

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[20] Order on Remand, *Unbundled Access to Network Elements*, WC Docket No. 04-313, CC Docket No. 01-338, FCC 04-290, ¶¶ 10, 24, 28, 167-73 (Feb. 4, 2005) ("*TR Remand Order*").

[21] *Id.* ¶ 26.

[22] 7/14/05 Joint CLECs Ex Parte at 2.

[23] SBC-AT&T Joint Opposition, Fea *et al.* Dec. ¶ 43.

[24] 7/14/05 Joint CLECs Ex Parte at 17.

[25] *Id.*

obtaining special access and connecting it to their fiber rings. Indeed, CLECs will have a greater ability to do so in the many situations where they are eligible for UNEs, but AT&T has not been.

In sum, the *facts* that have been placed in the record squarely establish that the merger can have no adverse effect on the provision of dedicated local services at wholesale to CLECs. Because the Joint CLECs have no answer to these facts and have resorted to speculation, surmise, or misstatements, their claims can now be summarily rejected.

Sincerely,

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APPENDIX A:
The Joint CLECs Have No Response To Applicants' Showing That The Proposed Merger Will Not Materially Reduce Wholesale Special Access Competition

Applicants have demonstrated through detailed record submissions and sworn testimony that AT&T had less than **[CONFIDENTIAL BEGIN] [CONFIDENTIAL END]** of wholesale local private line revenue in the entire SBC region,[1] and, based upon its declining year to date sales, AT&T now estimates that its annual sales of wholesale local private line service in the SBC region will be approximately **[CONFIDENTIAL BEGIN] [CONFIDENTIAL END]**, less than half of which is sold to CLECs collectively and only about a quarter of which is sold to CLECs other than **[CONFIDENTIAL BEGIN] [CONFIDENTIAL END]**[2] And even taking its sales to all private line customers into account,[3] AT&T accounts for a tiny fraction of the many billions of dollars of total wholesale dedicated access services and, indeed, only about **[BEGIN CONFIDENTIAL] [END CONFIDENTIAL]** of total dedicated access services provided by competitive carriers nationally.[4]

Recognizing that AT&T's wholesale sales are far too limited to have any competitive significance, the Joint CLECs assert that AT&T has understated its sales by failing to include entire categories of dedicated local access services.

- The Joint CLECs first speculate that AT&T failed to include local interoffice transport, entrance facilities, and DEF services in its wholesale local private line sales figures.[5] In fact, the wholesale local private line revenue data AT&T provided to the Commission includes AT&T's wholesale revenues from all of these services.

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[1] *See* SBC-AT&T Joint Opposition, Fea *et al.* Dec. ¶ 43; AT&T Response to FCC Information Request No. 5(c).

[2] In Applicants June 24, 2005 filing, Applicants noted that two of the complaining CLECs buy *no* wholesale local private line services from AT&T at all, and the third currently spends less than **[CONFIDENTIAL BEGIN] [CONFIDENTIAL END]** 6/24/0/5 SBC-AT&T Ex Parte at 11. Applicants have subsequently determined that the third CLEC also purchases service under a different name, but that its total purchases are still minor – about **[CONFIDENTIAL BEGIN] [CONFIDENTIAL END]** a month.

[3] As previously noted, AT&T denominates customers according to the sales organization that serves them. AT&T's Wholesale Sales organization serves many different types of customers, and CLECs represent a minority of AT&T's total sales to "wholesale" customers, even for services such as wholesale local private line. Other types of customers served by the Wholesale Sales organization include, among others, wireless carriers, system integrators, cable companies, RBOCs and IXCs.

[4] 7/15/05 SBC-AT&T Ex Parte at 5.

[5] 7/14/05 Joint CLEC Ex Parte at 17-18.

- The Joint CLECs next fault AT&T for not including wholesale sales of ultra-high capacity OptEring, Wavelength and Accu-Ring services.[6] AT&T has no OptEring or Wavelength wholesale customers in the SBC region. Wholesale revenues from Accu-Ring services were not included because this service is provided in connection with AT&T's long distance services to retail (or wholesale) long distance customers. In addition, even if AT&T's sales of Accu-Ring services were relevant here, AT&T earns less than **[CONFIDENTIAL BEGIN] [CONFIDENTIAL END]** annually from the sales of "wholesale" Accu-Ring services in SBC's region – none of which is associated with CLEC use. Indeed, most of AT&T's "wholesale" Accu-Ring customers are not even carriers.

- The other services identified by the Joint CLECs (Frame Relay, ATM, High Speed Packet) are economically irrelevant to the claims they are advancing. These packet services are not "layer 1" dedicated access services, but "layer 2" services that also use AT&T's packet switching network. As such, these services, too, are no more in the relevant market than any of AT&T's other long distance services because they provide significantly more than the mere "bandwidth" functionality provided by ILEC dedicated access. In all events, AT&T's wholesale sales of local packet services in the SBC region are trivial – less than **[CONFIDENTIAL BEGIN] [CONFIDENTIAL END]** annually in all 13 SBC states (which may include sales in non-SBC territories in those states).

The Joint CLECs also claim that Applicants' evidence in this proceeding is contrary to their prior statements.

- The Joint CLECs point to a statement by AT&T's Chairman last year announcing that AT&T plans "to be an 'arms merchant' to other carriers by selling them wholesale capacity on AT&T's network."[7] But that statement had nothing at all to do with wholesale special access services. Rather, as the article clearly states, Mr. Dorman was referring to AT&T's aspirations to supply "Internet telephony and wholesale long-distance minutes" to cable companies and ILECs.[8]

- The Joint CLECs next cite to a reference in an AT&T 10-K filing that AT&T's "local voice transport revenues totaled $1.6 billion in 2004," a figure the Joint CLECs claim is "worlds apart" from AT&T's evidence in this proceeding.[9] In fact, as the cited 10-K clearly states, AT&T reported $1.6 billion in revenue for its local *voice* sales to business customers, which include retail sales of switched voice services and UNE-based voice sales but does not include *any* dedicated

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[6] *Id.*

[7] 7/14/05 Joint CLEC Ex Parte at 17.

[8] Leslie Cauley, *AT&T Rings in a New Business Strategy*, USA Today, Aug. 9, 2004, at 1B.

[9] 7/14/05 Joint CLEC Ex Parte at 18.

local data "transport" services such as local private line services.[10] Rather, such services are included in the separate category for "data services," which is expressly defined to include "dedicated private line services" and this category includes the wholesale local private line revenues that AT&T earned in the entire SBC region in 2004.

- The Joint CLECs further claim that AT&T's actual sales "must simply be disregarded" in favor of an estimate by a third-party analyst that had no access to the underlying sales data.[11] But third party estimates cannot be reasonably relied upon when the actual data are available. And, as Applicants have explained, a comparison of the concrete facts with the Yankee Group's estimate confirms that Yankee overstated AT&T's revenues by more than six-fold.[12]

- Finally, the Joint CLECs assert that in the Triennial Review Remand Proceeding SBC claimed "AT&T is a formidable local competitor and that AT&T's use of special access is a primary source of competition to them."[13] But those are the Joint CLECs' words; they are not SBC's words and the Joint CLECs have grossly misrepresented SBC's position. As even a cursory review of the filing at issue makes clear that SBC was not discussing AT&T's wholesale local access services. Rather, SBC was arguing that: (i) AT&T overwhelmingly relies on special access, *as opposed to UNEs*; and (ii) AT&T uses special access to compete in the retail enterprise market, as are numerous other CLECs

Unable to cast doubt on AT&T's affirmative evidence, the Joint CLECs contend that Dr. Wilkie's "bid" analysis shows that AT&T's presence in the marketplace has a substantial constraining force on wholesale prices.

- Although they claim that Dr. Wilkie's purported regression analysis shows that "AT&T is a major player" in "the market for alternatives to SBC for wholesale

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[10] AT&T 2005 10-K at 43. On the page cited by the Joint CLECs, the 10-K states that "AT&T Business' services include long distance, international, toll-free and local voice, including wholesale transport services (sales of services to service resellers, such as other long distance companies, local service providers, wireless carriers and cable companies), as well as data services and IP & E services." AT&T 2005 10-K at 42. The Joint CLECs apparently read the term "including wholesale transport services" as applying exclusively to "local voice." In actuality, no "wholesale transport services" are included in the revenues reported for local voice – these are revenues derived from AT&T's sale of wholesale *long distance* voice services, and are included in the "long distance voice" category. The 10-K further confirms a few sentences later that the services at issue here – dedicated private line services – are not included in the "local voice" category but the "data services" category: "[d]ata services include bandwidth services (dedicated private line services through high-capacity optical transport) and packet services." *Id.*

[11] 7/14/05 Joint CLECs Ex Parte at 19.

[12] 7/15/05 SBC-AT&T Ex Parte at 5.

[13] 7/14/05 Joint CLECs Ex Parte at 3.

special access facilities,"[14] the Joint CLECs have refused to provide any of the data relied upon by Dr. Wilkie – which are data that only the Joint CLECs possess.[15] Nor have they revealed the key parameters of the regression study that are needed to allow for an independent assessment of the statistical significance of Dr. Wilkie's result. If the Joint CLECs had any confidence in Dr. Wilkie's analysis, they would be willing to subject the analysis to meaningful review. No reliance can be placed on a "study" whose sponsors refuse to place it in the record.

- In any case, in contrast to the Joint CLECs' unsubstantiated claims, the hard facts and record evidence demonstrate that AT&T's wholesale local private line rates are routinely *higher* than those of other CLECs. Applicants have confirmed their initial analysis that AT&T's average prices are higher than the average prices it pays CLECs[16] by comparing directly AT&T's "promotional" prices for wholesale local private line services with the prices AT&T pays CLECs for special access in SBC territories. Specifically, Applicants compared the prices for DS1 and DS3 circuits in California, Illinois and Texas, controlling for circuit length, term of contract, and density zone. This analysis showed that CLEC rates are routinely lower than AT&T's promotional wholesale rates using the maximum available discount and that in every state examined there are always multiple CLECs that offer substantially lower prices than AT&T's promotional rates.[17] This disparity

[14] *Id.* at 15.

[15] *See* 06/22/05 Letter from Michael Hunseder to Brad Mutschelknaus; 06/29/05 Letter from Brad Mutschelknaus to Michael Hunseder.

[16] 6/24/05 SBC-AT&T Ex Parte at 7 n.25.

[17] For example, Applicants compared AT&T's current wholesale prices on a typical 5-mile DS1 and DS3 Type I circuit bought under a one year contract in "density zone 1" in California, Illinois and Texas with the prices that AT&T's approved vendors in those states offered the same type circuit to AT&T. In California, the median CLEC contract price for the representative DS1 circuit was **[CONFIDENTIAL BEGIN] [CONFIDENTIAL END]** lower than AT&T's promotional price, and the lowest available price was **[CONFIDENTIAL BEGIN] [CONFIDENTIAL END]** lower than AT&T's promotional discount price; for a DS3, the median CLEC price was **[CONFIDENTIAL BEGIN] [CONFIDENTIAL END]** lower than AT&T's promotional price, and the lowest available price was **[CONFIDENTIAL BEGIN] [CONFIDENTIAL END]** lower than AT&T's promotional price. In Illinois, the median CLEC price for the representative DS1 circuit was **[CONFIDENTIAL BEGIN]** lower than AT&T's promotional price, and the lowest available price was **[CONFIDENTIAL BEGIN] [CONFIDENTIAL END]** lower than AT&T's promotional price; for a DS3, the median CLEC price was **[CONFIDENTIAL BEGIN] [CONFIDENTIAL END]** lower than AT&T's promotional price, and the lowest available price was **[CONFIDENTIAL BEGIN] [CONFIDENTIAL END]** lower than AT&T's promotional price. Finally, in Texas, the median CLEC price for the representative DS1 circuit was **[CONFIDENTIAL BEGIN]** lower than AT&T's promotional price, and the lowest available price was **[CONFIDENTIAL BEGIN] [CONFIDENTIAL END]** lower than AT&T's promotional price; for a DS3, the median CLEC price was **[CONFIDENTIAL BEGIN] [CONFIDENTIAL END]** lower than AT&T's promotional price, and the lowest available price was **[CONFIDENTIAL BEGIN] [CONFIDENTIAL END]** lower than AT&T's (continued . . .)

is likely one of the reasons why AT&T's wholesale local private line revenues have been steadily declining over the last several years.[18]

- Finally, the Joint CLECs' assertion that AT&T's mere presence causes other CLECs to submit lower bids flies in the face of the marketplace reality of AT&T's miniscule share of the overall dedicated access market (as noted above, no more than **[CONFIDENTIAL BEGIN] [CONFIDENTIAL END]** of total CLEC sales of dedicated access services). It defies logic to suggest that a firm with such a small share, declining revenues, and above-average prices can impose substantial discipline on the prices that other CLECs charge for similar services.

(. . . continued)
promotional price. Similar results were obtained when examining 0- and 10-mile circuits and three year contract terms. This comparison is also quite conservative, because it excluded AT&T's Type II services and prices for these services are substantially higher than that AT&T's Type I services.

[18] AT&T's wholesale local private lines revenues have decreased over **[CONFIDENTIAL BEGIN] [CONFIDENTIAL END]** since 2002.

APPENDIX B:
The Joint CLECs Have No Response To Applicants' Showing That The Proposed Merger Will Not Materially Reduce Facilities-Based Special Access Competition

As Applicants have shown, AT&T targets the same "high demand" buildings in the same dense commercial areas as other CLECs, and AT&T has deployed local fiber to only about 1750 commercial buildings in the entire SBC region.[1] More than seven out of ten of those buildings are exclusively "fiber-to-the-floor" arrangements that AT&T uses to serve a retail commercial customer with equipment that is deployed in that customer's premises and cannot be used to serve other tenants in the building. If AT&T wanted to provide a DS1 circuit (or even multiple DS1 circuits) to another tenant in one of these "on-net" buildings, AT&T could not economically do so over its own facilities, but would have to obtain the circuit(s) from SBC (or from a CLEC that had facilities that allow it to serve the entire building).

In contrast, CLECs have deployed local fiber to many times the number of buildings as AT&T in the SBC region, including many of the same buildings as AT&T, and they typically deploy "common space" arrangements through which they can serve *any* customer in a building.[2] Applicants have also demonstrated that virtually all of AT&T's buildings readily could be served by other CLECs that have nearby fiber transport networks in the same areas.[3] And Applicants have shown that any remaining buildings are too few and too scattered to have any competitive significance.[4]

Applicants have supported these facts with substantial and uncontroverted record evidence. We have placed in the record detailed building-by-building inventories of both AT&T's local building connections (and other local facilities) and the subset of CLEC building connections that AT&T's CLEC suppliers have disclosed to AT&T in the markets where those CLECs have been approved to provide service to AT&T.[5] We have shown that, not withstanding that AT&T's building list is underinclusive, that list shows that other CLECs have already deployed fiber to about **[CONFIDENTIAL BEGIN] [CONFIDENTIAL END]** of the approximately 1750 AT&T on net commercial buildings in the SBC region.[6] We have also

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[1] SBC-AT&T Joint Opposition, Fea *et al.* Dec. ¶¶ 7-14; AT&T Response to FCC Information Request Nos. 6(a).

[2] SBC-AT&T Joint Opposition, Fea *et al.* Dec. ¶¶ 7-14; AT&T Response to FCC Information Request Nos. 6(a) & 6(d).

[3] *See* 6/24/05 SBC-AT&T Ex Parte at 2; SBC-AT&T Joint Opposition, Carlton-Sider Reply Dec. ¶¶ 31-51 & App. 1.

[4] *See* 6/24/05 SBC-AT&T Ex Parte at 1-2.

[5] AT&T Response to FCC Information Request Nos. 6(a) & 6(d). As Applicants have explained, AT&T's "CLEC vendor" list *understates* CLEC lit buildings because it excludes many prominent CLECs and typically contains building data for just two or three CLECs per market. In addition, AT&T's database is intended to reflect only locations where the CLEC can provision service to AT&T in the time frames AT&T specifies.

[6] *Id.*; 6/24/05 SBC-AT&T Ex Parte at 10 n.38. Applicants have subsequently analyzed Telcordia's CLONES database and identified building locations where a CLEC has registered customer premises equipment used to connect a fiber lateral directly to the building. As

(continued . . .)

identified the AT&T buildings that offer the types of OCn-level opportunities the Commission has found – and these same CLECs agreed – are attractive enough to support multiple facilities-based entry.[7] We have provided collocation data that show AT&T has established fiber-based collocations in only a small fraction of SBC's wire centers and that multiple CLECs are typically collocated in the same central offices as AT&T.[8] And we have provided the Commission with CLEC fiber data and maps that confirm the close proximity of CLEC fiber to AT&T's fiber and on-net buildings and, indeed, that CLEC fiber blankets the areas where AT&T has a presence and that several individual CLECs have deployed as much or more fiber in these cities as AT&T.[9] These hard data demonstrate that AT&T's local facilities are not unique in any way and that the many other CLECs that actively compete in these areas and stand ready to replace AT&T will assure that there is no substantial reduction in facilities-based competition.

The Joint CLECs have submitted no evidence that controverts these facts. They have not denied that the limited CLEC lit buildings lists available to AT&T are accurate. And although they know of additional buildings that they and other CLECs have lit, they have refused to provide the Commission with such information. And notably, the limited information that they have provided based on the lit building lists they have already supplied to their expert suggests that those lists alone have more CLEC lit buildings than the subset available to AT&T. The CLECs have likewise refused to supplement the record with the fiber route data in their possession.

(. . . continued)
explained in greater detail below, this analysis is likely conservative, because many CLECs do not register, or do not consistently register, their customer premises equipment in CLONES. That analysis indicated an additional 87 AT&T lit buildings that are also served by CLECs beyond the approximately **[CONFIDENTIAL BEGIN] [CONFIDENTIAL END]** buildings indicated by AT&T's CLEC vendor database. CLONES also showed that a CLEC had registered some type of equipment in another 177 AT&T lit buildings, although CLONES did not contain sufficient detail to determine whether the equipment supported a fiber lateral.

[7] SBC-AT&T Joint Opposition, Carlton-Sider Reply Dec. ¶ 38 & Fea *et al.* Reply Dec. ¶ 30; AT&T Response to FCC Information Request No. 6(a).

[8] SBC-AT&T Joint Opposition, Carlton-Sider Reply Dec. ¶ 56. The Joint CLECs assert that the collocation data Applicants' have sponsored has "little meaning" because it does not show whether collocation exists "on both ends of a route." 7/14/05 Joint CLEC Ex Parte at 21. This is wrong. Wholesale customers rarely seek transport between ILEC offices, but rather between an ILEC LSO and the customer's network location. Applicants' collocation data are thus an appropriate measure of the extent to which CLECs have deployed local fiber transport in particular locations. Indeed, Applicants' data do not reflect fully the availability of competitive supply because fixed wireless and cable providers generally do not collocate in ILEC central offices to provide service. Further, Applicants' collocation data are probative of the extent to which other CLECs can offer partial Type II access services. In all events, AT&T provides only about **[CONFIDENTIAL BEGIN] [CONFIDENTIAL END]** a month in such stand-alone wholesale local transport service in the SBC region.

[9] *See* 7/18/05 SBC-AT&T Joint Ex Parte (attaching maps); 6/24/05 SBC-AT&T Joint Ex Parte (attaching maps).

Instead, the Joint CLECs respond with misrepresentations, claims they know to be wrong, as well as prior estimates of analysts and others that lacked access to the underlying data and that the record evidence in this proceeding demonstrates are wrong.

- The Joint CLECs assert that the "UNE Report" sponsored by SBC in the Triennial Review Remand Proceeding shows that AT&T has "twice as much [local fiber] as any other competitive carrier and more than 1/3 of all competitive local fiber deployed in the entire nation."[10] That report says no such thing. Rather, as the UNE Report makes clear, its authors were able to obtain local fiber mile data for only *eight* of the 25 CLECs listed in the report.[11] That AT&T had 1/3 of the competitive fiber deployed by that small subset of CLECs – which does not, for example, include any fiber for substantial networks of some of the Joint CLECs[12] – is of no conceivable relevance.

- Similarly, there is no basis for the Joint CLECs' assertion that AT&T is "by far" the CLEC who has had the most success deploying fiber nationally.[13] On a national basis, the one existing public data source of local fiber deployed by individual CLECs indicates that at least four CLECs – complainant XO, McLeod USA, Time Warner Telecom, and Telcove – have deployed comparable (or greater) local fiber miles as AT&T and that another two CLECs (MCI and ITC^Delta Com) have deployed substantial amounts of local fiber. Of the carriers who have deployed more than 10,000 route miles of local fiber, NPRG shows that AT&T has 21,000 fiber route miles, while showing that XO has 27,400, McLeod has 31,000, Telcove has 20,665, ITC has 14,500, and MCI has 11,500.[14] Although the mileage figures appear to be estimates, and may understate or overstate CLEC deployment in some respects,[15] these data squarely foreclose the Joint CLECs' unsupported allegation that AT&T has deployed "far" more fiber than other CLECs.

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[10] 7/14/05 Joint CLECs Ex Parte at 4. The Joint CLECs also state AT&T has 1.44 million fiber miles and 8,603 SONET rings. *Id.* With regard to the former claim, the relevant statistic, of course, is route-miles of fiber. As AT&T's 2005 10-K states, AT&T has only about 21,655 route-miles of local fiber. AT&T 2005 10-K at 5. With regard to the latter, the number of SONET rings says little about the scope of a local network, because individual SONET rings can be as short as a few hundred feet and connect just a handful of points.

[11] UNE Report at III-4.

[12] *Id.*

[13] 7/14/05 Joint CLECs Ex Parte at 12.

[14] *See* NPRG CLEC Report 2005, Table 14. Overall, NPRG reports that CLECs have in aggregate deployed 373,785 route-miles of fiber. *Id.* Even if NPRG's data are overstated for some individual CLECs, it is clear that AT&T has deployed on a small fraction of CLEC fiber.

[15] These figures, to be sure, are estimates, but the figure is accurate for AT&T and is very close to the mileage figures that have been publicly reported by Time Warner Telecom (19,000 local fiber miles) and MCI (13,000 local fiber miles). *See* http://www.twtelecom.com/about_us/networks.html#TWTC; MCI 2005 10-K at 11.

- The Joint CLECs contend that a "lit" building list provided by AT&T to certain CLECs generally shows substantially more buildings than the list provided by AT&T to the Commission.[16] Although the Joint CLECs have refused to identify the list or place it in the record, it is now apparent that the Joint CLECs are relying on a list of buildings provided by Global Crossing. Now that this list has finally been identified, it is obvious why the Joint CLECs resisted doing so for so long: it is clear that the list could never have seriously believed it to be an accurate representation of AT&T's lit building inventory. The majority of the buildings on the list are clearly labeled as having only *voice grade DS0 connections* that neither AT&T nor any other CLEC could ever economically construct. Moreover, the list includes many buildings in areas (*e.g.*, Oklahoma) in which AT&T has *no* local facilities. That is because, as AT&T has separately demonstrated, the list is the meaningless product of a regrettable computer logic error and has no probative value.[17]

- The Joint CLECs also question Applicants' granular fiber route data.[18] In fact, as Applicants have explained, the GeoTel fiber route data we used significantly *understates* CLEC fiber deployment, because it does not reflect all local fiber routes or even all CLEC fiber networks.[19] The Joint CLECs note that for AT&T fiber, Applicants used AT&T's own internal fiber route data, rather than relying upon GeoTel, but that only makes Applicants' point. While, contrary to the Joint CLECs' misstatement, GeoTel included most of AT&T's fiber in the markets Applicants' have analyzed, GeoTel's data on AT&T fiber, like its data on other CLECs' fiber, are not complete. Applicant's use of AT&T's own fiber route data thus overstates the significance of AT&T's fiber deployment relative to other CLECs. Notably, the Joint CLECs do not claim that GeoTel overstated the fiber that they have deployed.

Nor do the CLECs have any response to Applicants' showing that the vast majority of the buildings that are currently "lit" by AT&T are the very high demand, dense commercial area buildings that the Commission has found are subject to multiple competitive supply.

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[16] 7/14/05 Joint CLECs Ex Parte at 9.

[17] More specifically, the list that Global Crossing received came from outdated database interface that relied upon TCG's non-standard CLLI codes to segregate "on net" from "off net" buildings. Several years ago, however, AT&T began a project of conforming TCG's idiosyncratic CLLI codes to the industry standard. The system that generated the building lists provided to Global Crossing, however, was not changed to reflect the updated CLLI codes. Although AT&T stopped supporting this aspect of the legacy system (or using it for AT&T's own internal purposes), the legacy system's interface was not closed down and some personnel in AT&T's wholesale sales organization were never informed that they should cease using the building counts generated by the legacy system. Applicants are providing further details about the building list provided to Global Crossing in an *ex parte* letter filed concurrently with this filing.

[18] *See* 7/14/05 Joint CLEC Ex Parte at 7 n.20.

[19] 6/24/05 SBC-AT&T Joint Ex Parte at 1 & n.1.

- The Joint CLECs repeat their claims that the Commission's impairment analysis is irrelevant in this merger review proceeding.[20] But the AT&T buildings at issue overwhelmingly meet the Commission's OCn-level trigger – a threshold that CLECs have *agreed* identifies buildings that are subject to multiple competitive supply and that they have not challenged in their pending appeal.[21]

- The Joint CLECs also claim that any impairment-based consideration of the merger's effects ignores potential building access and rights-of-way problems, but that is also false.[22] AT&T's very presence in these particular buildings demonstrates that rights-of-way or conduit are available, that the building owner is amenable to competitive supply and there are customers in those buildings that are willing to buy service from competitive carriers.

- The Joint CLECs' additional claim that the Commission's impairment findings could never have relevance in a merger analysis merely repeats verbatim their prior arguments that Applicants have refuted.[23] As Applicants explained,[24] the Commission's impairment analysis seeks to identify "when lack of access to an incumbent LEC network element poses a barrier or barriers to entry, including operational and economic barriers, that are likely to make entry into a market uneconomic."[25] Moreover, the Commission has found that its impairment criteria accurately reflect instances where CLECs can currently self-deploy the same types of facilities that AT&T has constructed.[26] And given that the Commission has found that entry in such circumstances is economic at *prevailing* prices, it is certainly the case that entry would be economic should SBC-AT&T try to *raise* prices.

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[20] 7/14/05 Joint CLECs Ex Parte at 13.

[21] *See* Opening Brief of CLEC Petitioners and Intervenors in Support, at 7-27 (filed in DC Cir. Docket No. 05-1095, July 26, 2005). Of the 1691 on-net AT&T buildings analyzed by Dr. Carlton and Dr. Sider, AT&T alone currently supplies two or more DS3 equivalents of demand to **[CONFIDENTIAL BEGIN] [CONFIDENTIAL END]** of these buildings.

[22] 7/14/05 Joint CLEC Ex Parte at 12.

[23] *Id.* at 13.

[24] *Compare* 7/14/05 Joint CLEC Ex Parte at 13 (providing block quote of 6/6/04 Responding CLEC Ex Parte Letter at 8) *with* 6/24/05 SBC-AT&T Joint Ex Parte at 9 (refuting this argument).

[25] Order on Remand, *Unbundled Access to Network Elements*, WC Docket No. 04-313, CC Docket No. 01-338, FCC 04-290, ¶ 10 (February 4, 2005) ("*TR Remand Order*"); *see also id.* ¶26 ("To the extent that the Commission was unclear on this point in the *Triennial Review Order*, we take this opportunity to emphasize that when we consider whether 'lack of access to an incumbent LEC network element poses a barrier or barriers to entry, including operational and economic barriers, that are likely to make entry into a market uneconomic,' *we refer to whether entry is economic by a hypothetical competitor acting reasonably efficiently.*") (emphasis added).

[26] *Id.* ¶¶ 10, 24, 28, 167-73.

In short, the record facts establish that AT&T's local fiber deployment presence is neither extensive enough nor unique enough for the merger to have any meaningful impact on the supply of dedicated local access services. And that is why the Joint CLECs ask the Commission to ignore the hard facts and detailed analyses of the specific facilities, capabilities and marketplace conditions at issue and instead to reach conclusions based upon high level area-wide HHI "concentration" analyses for which the Joint CLECs continue to refuse to provide any of the underlying data or assumptions. [27] By including their HHI calculations areas and buildings out of the economic reach of AT&T and other CLEC fiber, these calculations mis-specify the geographic market in which AT&T participates and thus are of no relevance for evaluating the impact of the proposed merger on competition.

The Joint CLECs chide Applicants for not sponsoring competing concentration analyses,[28] but they ignore Applicants' showings that such static concentration analyses, however calculated, are simply irrelevant. In this regard, it has been "many years since anyone knowledgeable about" such matters "thought that concentration by itself imported a diminution in competition."[29] Instead, as both the Commission[30] and the antitrust courts[31] have repeatedly recognized, it is the "availability" of competitive supply – either by existing suppliers or potential entrants – that is the key consideration in assessing whether a firm can exercise market power.[32] As Applicants have shown through their submission of detailed information about the specific markets, fiber facilities and buildings at issue, there is ample competitive supply from many other providers in these dense commercial areas served by AT&T, and such supply will assure that this merger does not substantially lessen competition, regardless of the outcomes of static HHI concentration calculations.

Moreover, although the Joint CLECs continue to refuse to disclose their underlying data or assumptions for their HHI study, the few details they have disclosed confirm that the

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[27] 7/14/05 Joint CLEC Ex Parte at 2-3.

[28] *Id.* at 2.

[29] *Capital Cities/ABC, Inc. v. FCC*, 29 F.3d 309, 315 (7th Cir. 1994).

[30] *See, e.g.*, Second Report and Order, *In the Matter of Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area*, 12 FCC Rcd. 15756 ¶ 28 (1997); Report and Order, *Review of the Prime Time Access Rule*, 11 FCC Rcd 546, ¶ 24 n.44 (1995); *Motion of AT&T Corp. to be Reclassified as a Non-Dominant Carrier*, 11 FCC Rcd 3271, ¶ 62 (1995).

[31] *See, e.g., United States v. Baker Hughes*, 908 F.2d 981, 987 (D.C. Cir. 1990) (merger of large share competitors would not permit exercise of market power because "entry was likely" if the merged entities tried to raise prices); *Ball Memorial Hospital, Inc.* v. *Mutual Hospital Insurance, Inc.*, 784 F.2d 1325, 1336 (7th Cir. 1986) ("Market share is just a way of estimating market power, which is the ultimate consideration. . . . Market share reflects current sales, but today's sales do not always indicate power over sales and price tomorrow"); *United States v. Syufy Ent.*, 903 F.2d 659, 665-66 (9th Cir. 1990) ("In evaluating monopoly power, it is not market share that counts, but the ability to maintain market share").

[32] *Time Warner Entertainment Co. v. FCC*, 240 F.3d 1126, 1134 (D.C. Cir. 2001) (citing *AT&T Corp. v. FCC*, 236 F.3d 729, 736 (D.C. Cir. 2001)). *See also* 7/15/05 SBC-AT&T Ex Parte at 5-7.

particular HHI computations they have submitted would be meaningless even if static concentration figures could inform the Commission's analysis.

- Most fundamentally, the Joint CLECs have ignored the very axiom they claim is paramount here: "Good fisherman fish where the fish are."[33] Like other CLECs, AT&T does not target for self-deployment buildings below the OCn-level – indeed, the Joint CLECs have vigorously argued that multiple competitive supply is generally not feasible for the vast majority of buildings in the SBC territories that do not have OCn-level demand.[34] To the extent that these "low demand" SBC buildings are not contestable (as the Joint CLECs claim to be the case), then an HHI concentration analysis that includes those buildings in SBC's share mis-specifies the geographic scope of the market and cannot produce meaningful results. By definition, AT&T does not compete for those buildings, so the change in concentration is necessarily *zero*. In contrast, a concentration analysis that looked only at contestable buildings in downtown areas of large cities would necessarily conclude that the "market" is relatively deconcentrated with multiple competing fiber-based CLECs, that SBC's share is much smaller than merger opponents have suggested, and that, in any event, ease of entry analysis would preclude any finding of competitive harm regardless of the calculated HHI increase.

- The Joint CLECs' HHI analysis is also based on flawed data that bias the results. Foremost, AT&T's "share" is clearly wrong because it is based on the erroneous AT&T lit building list discussed above, which overstates AT&T's on-net buildings by about 300 percent. And because the incorrect AT&T building lists greatly overstate AT&T's actual lit buildings, the Joint CLECs have overstated both AT&T's market share and overall market concentration.

- Moreover, the Joint CLECs' latest submission reveals that they have calculated HHIs on a "bandwidth" basis (as opposed to a lit building basis).[35] But such an analysis obviously depends critically upon accurate information regarding the total bandwidth into each building and the amount of bandwidth supplied to each

[33] 7/14/05 Joint CLEC Ex Parte at 4.

[34] *See, e.g.*, Loop-Transport Coalition Comments at 99 (CC Docket 01-338 *et seq.*, Oct. 4, 2004) (it is "cost effective" to deploy OCn-level facilities); *id.* at 88-100 (arguing impairment exists for DSn-level loops); ALTS *et al.* Comments at 5-6 (CC Docket 01-338 *et seq.*, Oct. 4, 2004) ("the Commission . . . reached a national finding of non-impairment for OCn loops. . . . . This approach was firmly based on market realities"); McLeod Comments at 15 (CC Docket 01-338 *et seq.*, Oct. 4, 2004) (revenues derived from deployment of OC3 loops can "provide a sufficient revenue opportunity to overcome [entry] barriers" but not for DSn-level loops). Indeed, the competitive carriers challenging the Commission's *TR Remand Order* have only attacked the Commission's impairment findings with respect to DS1 level facilities. Opening Brief of CLEC Petitioners and Intervenors in Support, at 7-27 (filed in DC Cir. Docket No. 05-1095, July 26, 2005).

[35] *See* 7/14/05 Joint CLEC Ex Parte at 9-12.

building by each carrier. The GeoResults "NTD" data upon which the Joint CLECs claim to have relied does not contain that information. Rather, GeoResults estimates total demand at buildings based on an unverifiable regression study of a sample of buildings. The results of this regression are used to *project* bandwidth demand and telecommunications spending for millions of buildings outside of the regression sample. But such an approach cannot possibly identify for the millions of buildings outside of the regression sample the individual offices or firms that have above-average or unique bandwidth needs, such as data or call centers. GeoResults does not provide any written documentation on how it makes its bandwidth estimates, nor does it provide information such as sample size that would allow an assessment of the statistical reliability of the estimates. Given these limitations, the GeoResults data are typically used as a tool for applications such as identifying potential sales opportunities, not, as Dr. Wilkie seeks to do, to calculate the actual bandwidth supplied by particular carriers to any building or group of buildings. Moreover, as the record in this proceeding demonstrates, many of the relevant high-demand buildings are connected to multiple networks, and the Joint CLECs have no data that would allow them to allocate the bandwidth in those buildings among the various providers.[36]

- Indeed, the GeoResults demand information is clearly *inaccurate*. For example, the Joint CLECs acknowledge that the NTD bandwidth data show that there are only 38 buildings with at least OC3 level of demand in the SBC-portion of Los Angeles and 93 such buildings in Chicago. But the hard evidence confirms the commonsense notion that there are far more high demand buildings than assumed by the Joint CLECs based on NTD data. AT&T's CLEC vendor lists show that CLECs alone have deployed fiber capable of supporting OCn-level service to more than **[CONFIDENTIAL BEGIN]** **[CONFIDENTIAL END]** buildings in the SBC-portions of the Los Angeles MSA and **[CONFIDENTIAL BEGIN]** **[CONFIDENTIAL END]** buildings in the Chicago MSA. While in some instances a CLEC deployed an OCn-level facility to serve a building with less than OCn-level demand, that is likely to be a relatively infrequent occurrence. Indeed, the very same CLECs that are challenging the merger have argued in the Triennial Review Remand Proceeding that competitive carriers will generally not deploy facilities to a building unless it has OCn-level demand.[37] Thus, even this limited sample shows that there are many times the number of OCn-level buildings in Los Angeles and Chicago than the Joint CLECs have assumed based on the inaccurate NTD data.

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[36] The Joint CLECs' reliance on bandwidth shares is also inappropriate because such shares overstate the relative economic importance of AT&T in the market. Per unit prices are much lower for high bandwidths, making AT&T's bandwidth share greater than its revenue share. This, in turn, would necessarily overstate AT&T's relative economic importance in the market place – if, as the Joint CLECs contend, AT&T tends to serve high bandwidth customers.

[37] *See supra* n.34; *see also, e.g.*, Loop-Transport Coalition Comments, XO Aff. ¶¶ 18-20 (CC Docket 01-338 *et seq.*, Oct. 4, 2004).

- But even if the GeoResults NTD data were accurate, they undermine the Joint CLECs' claim that the high concentration they show for OCn-level buildings can be explained by the "fact" that "few, if any, competitive carriers other than AT&T and MCI have an on-net presence in the 'largest' buildings."[38] Applicants have mapped AT&T's lit building list and AT&T's CLEC vendor lit building list to the NTD bandwidth data. For those buildings where there were NTD data available, Applicants then compared the relative number of "high demand" (*i.e.*, OC3 or greater) buildings served by AT&T and its CLEC vendors. That comparison showed that overall CLECs served *more* "high demand" buildings than AT&T, and that a comparable or higher percentage of CLEC lit buildings were "high demand" buildings than AT&T lit buildings.[39] In all events, this claim is foreclosed by the fact that CLECs have deployed local fiber to thousands more buildings than AT&T in the SBC region and that they have acknowledged that such deployment is only economic when the building has at least OC3 level demand.

- Finally, the Joint CLECs ignore the one key conclusion that must be drawn from any bandwidth-based analysis. On a bandwidth basis, 65% of the demand that AT&T serves in its on-net buildings is to buildings where other CLECs have *already* deployed their own fiber connections and 99.4% is to buildings that CLECs would not be "impaired" in serving.[40]

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[38] 7/15/05 Joint CLECs Ex Parte at 11.

[39] Specifically, for the buildings where NTD data were available, in Chicago, the GeoResults NTD data show that AT&T has lit 13 so-called high demand buildings while CLECs have lit 25 such buildings. Similarly, in Los Angeles, the GeoResults NTD data show that AT&T has lit 10 "high demand" buildings while CLECs have lit 16. The NTD data also show that CLECs overall percentage of "high demand" lit buildings in these markets is comparable to or greater than AT&T's. For example, in Chicago only 11% of AT&T's lit buildings are "high demand" compared to 16% of CLEC buildings."

[40] *See* SBC-AT&T Joint Opposition, Carlton-Sider Reply Dec. ¶¶ 35, 42.

APPENDIX C:
The Joint CLECs' Have No Response To Applicants' Showing That Other CLECs Have Equal (Or Greater) Ability To Engage In Resale Arbitrage Of SBC Special Access

Applicants have demonstrated through their record submissions that AT&T does not engage in pure resale of SBC's special access services and that any fiber-based CLEC has an equal (or greater) ability to provide "hybrid" or "partial" Type II services that use special access "tails" leased from SBC. Applicants have also shown that AT&T has no resale advantage by virtue of receiving larger volume discounts from SBC than other CLECs.[1] Further, Applicants have provided fiber map and collocation data that shows, in each of the dense commercial areas of the large cities at issue, there are multiple fiber-based CLECs that are active in the same areas as AT&T and that can and do provide partial Type II circuits.[2] And Applicants have shown that AT&T's Type II wholesale private line service sales are trivial: less than **[CONFIDENTIAL BEGIN] [CONFIDENTIAL END]** per year in the entire SBC region, less than one-third of which are to CLECs.[3]

The Joint CLECs do not directly contest any of these facts, nor do they offer any evidence showing that AT&T has a substantial resale business. Instead, they persist in claiming that AT&T enjoys unique advantages that give it the opportunity to provide Type II wholesale access services at prices lower than any other CLEC.

- Without acknowledging Applicants' detailed showings to the contrary, the Joint CLECs baldly assert that AT&T receives higher discounts than other CLECs, because "no other CLEC possesses the traffic volumes required to qualify for the maximum discounts."[4] As Applicants have repeatedly documented through SBC's tariffs and through sworn testimony that the Joint CLECs refuse to acknowledge, AT&T's higher volumes have *not* enabled AT&T to receive lower rates.[5]

- The Joint CLECs also suggest – again, with no evidence – that AT&T orders circuits of much higher OCn-level bandwidth from SBC than other CLECs and that this gives AT&T an advantage.[6] In fact, virtually all of special access circuits that AT&T purchases from SBC – and *all* of the special access "tails" that AT&T purchases from SBC for use in partial Type II arrangements – are DSn-level circuits, the vast majority of which are DS1 circuits. When it needs an OCn-level circuit AT&T typically supplies that facility itself or purchases it from a CLEC.

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[1] 6/24/05 SBC-AT&T Ex Parte at 6-7; SBC-AT&T Joint Opposition, Casto Dec. ¶¶ 3-9.

[2] *See* 7/18/05 SBC-AT&T Joint Ex Parte; 6/24/05 SBC-AT&T Joint Ex Parte; SBC-AT&T Joint Opposition, Carlton-Sider Reply Dec. ¶ 56.

[3] SBC-AT&T Joint Opposition, Fea *et al.* Dec. ¶ 43.

[4] 7/14/05 Joint CLECs Ex Parte at 17.

[5] 6/24/05 SBC-AT&T Ex Parte at 6-7; SBC-AT&T Joint Opposition, Casto Dec. ¶¶ 3-9.

[6] 7/14/05 Joint CLECs Ex Parte at 17.

And AT&T does not even have in place the capability for optical provisioning that would be necessary in order to purchase OCn-level tails that terminate in its collocation cages for partial Type II arrangements. But even with respect to DS3 special access tails that terminate on AT&T collocations, AT&T cannot offer DS1-level wholesale local private line services by channelizing the circuit. A DS3 special access loop AT&T that purchases from SBC connects to a particular AT&T customer's premises in the building, and, where AT&T is using special access to serve a customer, AT&T has neither the equipment nor the necessary permission from the initial customer in place that would be required to use such leased loops to serve other customers in the building.

- The Joint CLECs also claim that AT&T's transport networks are broader in scope and provide more opportunities for efficient "hybrid" circuits than those of other carriers.[7] But as the maps Applicants recently provided demonstrate, that is demonstrably false even with respect to individual CLECs and even more plainly so with respect to CLECs collectively. As noted, not only have CLECs in the aggregate deployed many more times the local fiber as AT&T, there are several individual CLECs with local fiber networks comparable in scope to AT&T's.

The Joint CLECs also renew their claim that AT&T's "unique" ability to offer Type II service is demonstrated by Dr. Wilkie's "concentration" analysis for the Cleveland and Milwaukee markets.[8] These studies, however, suffer from the same flaws as Dr. Wilkie's HHI studies – they report only static market share without any rigorous analysis of the demand and supply substitution. Moreover, they fail even to measure static market shares correctly.

- The Joint CLECs now concede that Dr. Wilkie relied on GeoResults' "Hubb" data for these studies.[9] These Hubb data are in turn derived from Telcordia's CLONES database. But, as Applicants have demonstrated, many CLECs do not register their equipment in CLONES, or do not do so consistently.[10] In contrast, AT&T rigorously registers its equipment in CLONES. AT&T also installs, and registers in CLONES, equipment in buildings even when it is providing only a "pure" Type II service – buildings that the CLECs concede are not economically

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[7] 7/14/05 Joint CLECs Ex Parte at 16-17.

[8] *Id.* at 5-7.

[9] *Id.*

[10] In our July 15, 2005 filing, Applicants provided results of a conservative sampling of known CLEC-lit buildings and showed that fully 30% of those locations would not be reflected in CLONES. Applicants have since performed an analysis on a much broader sample. Specifically, Applicants examined CLONES for every instance where CLECs have provided AT&T a CLLI-code for one of their lit buildings. AT&T then compared this list against the CLONES entries for these buildings. If one relies only on records that explicitly give an indication of an active fiber, then the CLONES records identify less than on-third of the instances where the CLECs have lit a building. If the existence of any CLONES record is assumed to be an indication of a CLEC presence, then the records only identify about two-thirds of the cases self-reported to AT&T.

relevant.[11] At the same time, CLONES contains scores of thousands of entries for AT&T that are obsolete. Because of these biases, the Joint CLECs' comparisons are meaningless because they overstate AT&T's buildings and understate other CLEC buildings.

- The Joint CLECs do not deny these problems with the GeoResults' Hubb data, claiming instead that SBC relied on GeoResults in precisely the same manner in the Triennial Review Remand Proceeding.[12] This is simply untrue. SBC used *an entirely different* database – GeoResults' "GeoLit" database. Unlike the GeoHubb database, the GeoLit data attempts to *exclude* Type II buildings and seeks to report only "on net" buildings. Moreover, SBC was using the GeoLit data for an entirely different purpose than the Joint CLECs. SBC was seeking to obtain an estimate of overall lateral deployment by CLECs and not compare deployment between CLECs. Thus, the fact that many CLECS do not record equipment in CLONES would only serve to make SBC's analysis *conservative*. What SBC did not seek to do, but what the Joint CLECs inappropriately seek to do in this proceeding, is to use the GeoResults Hubb data to compare AT&T's relative fiber deployment against those of other CLECs.

- In all events, third party estimates can never be used to challenge substantiated facts. As SBC made clear, GeoResults was only a second-best alternative to actual CLEC lit building information. That is why, in the very declaration cited by the Joint CLECs, SBC (and the Illinois Commerce Commission) took the position that "GeoResults is a reasonably reliable source, *absent concrete evidence to the contrary from a competing provider with respect to specific locations*."[13] Of course, that is exactly what the Commission has here – Applicants have submitted in the record concrete building-by-building evidence and explained why, for reasons specific to AT&T, GeoResults CLONES source does not give a reliable picture of AT&T. And SBC there, as here, pointed out reasons why the GeoResults CLONES data are likely to understate locations for other CLECs that do not make consistent use of CLONES.

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[11] 7/14/05 Joint CLECs Ex Parte at 6 (defending Dr. Wilkie's reliance on Type II buildings only to the extent that GeoResults shows instances where a carrier has "leased special access channel termination *connected to CLEC-owned backbone fiber*") (emphasis added).

[12] *Id.* at 7.

[13] Alexander-Sparks Dec. ¶ 23 (attached to 11/16/04 SBC Ex Parte in CC Docket 01-338 *et seq.*) (emphasis added).